Supreme Court, U.S.
FILED
MAY 30 1991
OFFICE OF THE CLERK

(2)

No. 90-1423

IN THE

Supreme Court of the United States

October Term, 1990

MASSILLON BOARD OF EDUCATION,
Petitioner,

vs.

THERESE A. FARBER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

LEONARD F. LYBARGER
Counsel of Record
2000 Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 771-4600
Attorney for Respondent
Therese A. Farber

THE GAYES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED

I. When a Title VII claim is improperly tried to the court before a parallel §1983 claim is tried to a jury and the trial court's judgment for the defendant on the Title VII claim is vacated, as required by *Lytle v. Household Mfg., Inc.*, 110 S. Ct. 1331 (1990), may not the Court of Appeals reverse and enter judgment for the plaintiff on the Title VII claim where the *undisputed* evidence (not appealed) shows that the defendant appointed a male candidate who did not possess the minimum stated qualifications, thereby being unable as a matter of law to articulate a nondiscriminatory reason for its action?

II. May an appellate court reinstate a verdict for a plaintiff which is within the range of damage evidence presented by the plaintiff where the trial court erroneously forces the plaintiff to accept a remittitur, rather than remanding to require the court to offer plaintiff a choice of the remitted verdict or a new trial on the issue of damages?

III. Did the Court of Appeals err by stating that certain equitable remedies, prejudgment interest and front pay, are *presumed* appropriate for a plaintiff who prevails on an employment discrimination claim?

PARTIES

The parties have been properly identified by the Petitioner.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES i

OPINIONS BELOW 2

STATEMENT OF THE CASE 3

Facts and Proceedings Below 3

REASONS FOR DENYING THE WRIT 5

I. Reversal Of The Title VII Judgment And Entry Of Judgment For The Plaintiff On Her 1980 Claim, Rather Than Vacating The Judgment, Did Not Violate Defendant's Right To Trial By Jury..... 5

II. Reversals With Final Judgment Are Proper On Occasion Where Trial Court Errs By Entering A "Forced" Remittitur 8

III. Appellate Courts May Grant Final Relief, Including Appropriate Equitable Remedies Such As Prejudgment Interest And Front Pay, Where The Record Shows Plaintiff Is Clearly Entitled To Such Relief..... 11

A. Prejudgment interest 12

B. Front pay 12

CONCLUSION..... 15

TABLE OF AUTHORITIES

Cases

AT&T Technologies, Inc. v. Blim, 469 U.S. 87 (1984) 13

Bartek v. Redevelopment Authority of Pittsburgh, 882 F.2d 739, 747 (3rd Cir. 1989) 13

Boyle v. United Technologies Corp., 487 U.S. 500, 514, 101 L. Ed. 2d 442, 459, 108 S. Ct. 2510 (1988) 7

Brewer v. Uniroyal, Inc., 498 F.2d 973 (6th Cir. 1974) 9,11

Curtis v. Loether, 415 U.S. 189, 198, 39 L. Ed. 2d 260, 268 (1974) 7

Davis v. Combustion Engineering, 742 F.2d 916, 922-23 (6th Cir. 1984) 13

Dillon v. Coles, 746 F.2d 998, 1006 (3rd Cir. 1984) 13

Floca v. Homcare Healthcare Services, Inc., 845 F.2d 108, 112 (5th Cir. 1988) 14

Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435, 1448 (11th Cir.), *cert. denied*, 474 U.S. 1005 (1985) 13

Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1209 (7th Cir. 1989) 13

Lytle v. Household Manufacturing, Inc., 110 S. Ct. 1331, 108 L. Ed. 2d 504 (1990) 5

Manning v. Altec, Inc., 488 F.2d 127, 133 (6th Cir. 1973) 11

Matherne v. Wilson, 851 F.2d 752 (5th Cir. 1988) 9,10

May v. Ellis Trucking Co., Inc., 243 F.2d 526 (6th Cir. 1957) 9,10

O'Donnell v. Georgia Osteopathic Hospital, Inc., 748 F.2d 1543, 1551 (11th Cir. 1984) 13

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979) 8

Staplin v. Maritime Overseas Corp., 519 F.2d 969, 974 (2nd Cir. 1975) 9,10,11

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) 7

Wildman v. Lerner Stores Corp., 771 F.2d 605, 616 (1st Cir. 1985) 13

Statutes And Constitutional Provisions

United States Constitution, Seventh Amendment ... 15

Federal Statutes:

Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* 11

Civil Rights Act of 1964, Title VII, 29 U.S.C. §2000e, *et seq.* 3,4,5,6,7,15

Civil Rights Act of 1871, 42 U.S.C. §1983 4,5,6,7,8,15

No. 90-1423

IN THE

Supreme Court of the United States

October Term, 1990

MASSILLON BOARD OF EDUCATION,
Petitioner,

vs.

THERESE A. FARBER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully prays this Court to deny for lack of substantial federal question the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, filed December 11, 1990.[1]

[1] The filing of Respondent's Brief in Opposition was delayed at Respondent's request due to the ongoing settlement negotiations between the parties. These discussions are continuing. In the event a settlement is entered into which would render moot the issues presented to this Court, counsel for Respondent will immediately notify the Clerk of this Court.

OPINIONS BELOW

The opinion of the Court of Appeals, dated December 11, 1990, is reported at 917 F.2d 1391 and is included in Petitioner's Appendix (pp. A1 to A19). This opinion is being deemed for purposes of this appeal as the same as the Sixth Circuit's first opinion, dated July 12, 1990, which was vacated by the December 11, 1990 order and opinion.

STATEMENT OF THE CASE

Facts[1] and Proceedings Below

Two important facts have been omitted by the defendant. The first is that the Court of Appeals found with respect to plaintiff's 1978 Title VII claim (denial of a principalship, *et al.*), that "[o]n the stipulated evidence, Otte [the successful male candidate] lacked the minimum stated qualifications for the position . . ." and had been chosen on the alleged ground of system seniority—a qualification not stated in either "the Board Handbook or the administration's posting." Petitioner's App., p. A11. The appellate court concluded that

> [t]he reasons offered are transparently pretextual, and appear to have been tailored to the needs of the occasion. Neither Appellee nor the district court has presented any examination of the validity of the putative criteria upon which the decision allegedly was made, and no rational basis presents itself from the record. They cannot, on their face, be called legitimate non-discriminatory reasons for an otherwise discriminatory decision.

Ibid. Accordingly, it reversed without remand the trial court's judgment.

The second fact omitted by defendant concerns plaintiff's 1980 Title VII claim—denial of the central office Director of Instruction position. The Court of Appeals again concluded that plaintiff had "established a prima facie case which the Board could not rebut with a legitimate non-discriminatory reason for its decision." *Ibid.*, at p. 13. The successful applicant, James Gides—a young male—also lacked the minimum stated

---

[1] Although defendant is not asking this Court to review the factual determinations made below (Petition, p. 4, n.1), plaintiff believes that a brief statement of additional facts is necessary for a proper understanding of the Court of Appeals' decision.

requirements for the position, which requirements had not been waived by the Board. Under such circumstances the Court of Appeals concluded that defendant could not use the subjective criterion offered by the Superintendent, the good "chemistry" between himself and Gides, "to distinguish among peers"—that is, between candidates having substantially equal qualifications, *Ibid.* Because the trial court's reasoning failed to meet the Sixth Circuit's "standards requiring close analysis of subjective criteria," its decision regarding the 1980 Title VII claim was likewise reversed and a final judgment entered for the plaintiff. *Ibid.*, at p. 14.

Defendant has explicitly stated that it is "not asking this Court to review these rulings . . ." Petition, p. 9. Hence, they stand as correct. More importantly, they also constitute undisputed facts and the law of the case upon the remand trial of plaintiff's §1983 claim with respect to the Board's unlawful sex discrimination in 1980.

REASONS FOR DENYING THE WRIT

I. Reversal Of The Title VII Judgment And Entry Of Judgment For The Plaintiff On Her 1980 Claim, Rather Than Vacating The Judgment, Did Not Violate Defendant's Right To Trial By Jury.

Defendant argues that *Lytle v. Household Manufacturing, Inc.*, 110 S. Ct. 1331, 108 L. Ed. 2d 504 (1990), required the Court of Appeals to remand after reversing the district court's erroneous judgment on plaintiff's 1980 Title VII claim (denial of the Director of Instruction position) in order to preserve defendant's right to have a jury consider whether such denial violated Section 1983. Defendant asserts that unless further proceedings are held on the Title VII claim, the jury hearing the §1983 claim will be collaterally estopped from finding for the defendant on such claim. Petition, pp. 11-15.

While agreeing that such a result would normally be required, plaintiff believes the evidence in the present case dictates a different result because upon remand of the §1983 claim the trial court will be required to grant plaintiff either a partial summary judgment or a directed verdict on the issue of defendant's liability for having intentionally deprived plaintiff of her civil rights on account of her sex contrary to §1983 in denying her the Director of Instruction position. Although this Court is loathe to accord "collateral estoppel effect to the trial court's factual determinations," preferring to remand "each case in its entirety for a trial before a jury," it should not apply this rule to the *unrebutted* facts in this case which have not been appealed. *Lytle*, 108 L. Ed. 2d, at 516. To do so will only cause further delay and unnecessary waste of judicial resources.

The Court of Appeals' analysis of the undisputed evidence brought out during the Title VII bench trial of plaintiff's 1980 Title VII claim for denial of the Director of Instruction position shows that defendant will not be able to survive a dispositive motion upon in connection with the §1983 remand trial. As discussed at pages 3-4, above, the Sixth Circuit's examination of the Board's written policies concerning the prerequisites for the Director's position

> undisputedly required that the appointee possess a minimum of five years of teaching experience and two years of administrative experience. [Plaintiff] easily met those requirements, and Gides [the appointee] did not. Gides had only three years of teaching experience prior to this appointment as an Assistant Principal . . . in 1974.

Petitioner's App., pp. A10-A11. The court went on to conclude that

> the district court's finding that Gides met the minimum stated requirements for the position, and that the Board had waived its standing qualifications was clearly erroneous.

Ibid., at 11. Continuing, the court found that the plaintiff "*established a prima facie which the Board could not rebut with a legitimate non-discriminatory reason for its decision.*" *Id.*, emphasis added.

Defendant's and the district court's reliance on the subjective factor of good "chemistry" between the male Superintendent and Mr. Gides was rejected as a blatant attempt to continue the tradition of only male administrators in the system's central office. *Id.*, at 12-13. Furthermore, the record evidence disclosed that the Board had never knowingly waived its published requirements for the position. Petitioner's App., p. A13. Gides' undisputed

failure to meet the Board's minimum requirements for the position meant, as a matter of law, that he could not have been equally as qualified as the plaintiff—or even nearly as qualified—to justify the use of the highly questionable, subjective factor of body "chemistry" to make him *more* qualified than the plaintiff.

There is no question that the defendant will not be able to present any evidence during the §1983 remand trial that Gides somehow met the Board's minimum qualifications and was chosen instead of the plaintiff for "a legitimate non-discriminatory reason," as required by *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252, 101 S. Ct 1089, 67 L. Ed. 2d 207 (1981). No amount of rearranging or juggling of the evidence during the §1983 remand trial can alter Gides' lack of teaching and administrative experience in 1980. Hence, it would be a waste of time to allow the defendant to go through the motion of presenting such evidence a second time, since the outcome will have to be the same. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 514, 101 L. Ed. 2d 442, 459, 108 S. Ct. 2510 (1988). Even if a jury would somehow erroneously conclude that Gides met the minimum qualifications and that the Superintendent's preference for the "chemistry" between himself and Gides was the reason he was chosen, the court would have to grant plaintiff a judgment notwithstanding a verdict for the defendant due to the defendant's inability to satisfy its evidentiary burden. *Curtis v. Loether*, 415 U.S. 189, 198, 39 L. Ed. 2d 260, 268 (1974). Consequently, the reversal and grant of final judgment by the appellate court on plaintiff's 1980 Title VII claim was correct.

Plaintiff submits that the Court's holding in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S Ct. 645, 58 L. Ed. 2d 552 (1979), should be extended in this case to collaterally estop the defendant's right to a jury trial on the issue of its having discriminated against her in 1980 on account of her sex contrary to §1983. Defendant's exercise of its right to a jury trial on that issue will be a meaningless ritual, since the outcome vis-a-vis its liability will be the same.

II. Reversals With Final Judgment Are Proper On Occasion Where Trial Court Errs By Entering A "Forced" Remittitur.

The Sixth Circuit does not follow a hard and fast rule when confronted by clear error of a trial court in forcing a plaintiff to accept a remittitur. Contrary to defendant' characterization, there is no real "split both among the circuits and within the Sixth Circuit" on the procedure to be followed. Petition, p. 15. Plaintiff submits that the cases cited where the jury's verdict was reinstated in lieu of a remand for a new trial or acceptance of a smaller award can easily be reconciled with those which have remanded for further proceedings. Requiring remands of every improperly remitted jury award would unduly restrict the corrective authority of the courts of appeals and, in many cases, cause a needless continuation of litigation. The present case is a prime example of an instance where justice required reversal and reinstatement of the jury's award, rather than a remand for acceptance of a remitted verdict or a new trial on the issue of damages.

The appellate court held that the trial judge erred in two respects in granting defendant's request for a remittitur. First, it concluded that the district court substituted its judgment as to the extent of plaintiff's

damages for that of the jury, which had weighed the conflicting evidence and chose to award plaintiff the maximum amount of the range of her pay loss. Petitioner's App., p. A4. Secondly, it found that the trial judge erred in forcing the plaintiff to accept a remittitur without giving her the right to a new trial on the issue of damages. Under these circumstances the appellate court reversed and reinstated the verdict, citing *Brewer v. Uniroyal, Inc.*, 498 F.2d 973 (6th Cir. 1974) and *Staplin v. Maritime Overseas Corp.*, 519 F.2d 969 (2nd Cir. 1975). Petitioner's App., pp. A4-A5. By so doing, defendant claims that the Sixth Circuit went against clear authority both within and without the Circuit and asks this Court to settle this "question of appellate procedure." Petition, p. 15.

Defendant cites dicta in *Matherne v. Wilson*, 851 F.2d 752, 762 (5th Cir. 1988) (recognizing necessity of remand to allow prevailing party to choose either a new trial or a remitted award) and the decision in *May v. Ellis Trucking Co., Inc.*, 243 F.2d 526, 527 (6th Cir. 1957) (remand of an erroneously forced remittitur) as authority for its position that remand is the only acceptable procedure in every instance of erroneous remittiturs. Petition, p. 15. Defendant then cites *Staplin v. Maritime Overseas Corp.*, 519 F.2d 969, 974 (2nd Cir. 1975) (suggesting remand as the preferred procedure, but nevertheless reversing and reinstating the jury verdict due to "minimal" amount in issue) and *Brewer v. Uniroyal, Inc.*, 498 F.2d 973 (6th Cir. 1974) (reversing and reinstating jury award which was within the range of damages received in evidence) to claim the existence of a "split" among the circuits and within the Sixth Circuit itself. Petition, p. 15.

These decisions are hardly evidence of a split of authority necessitating review by this Court, as defendant claims. Petition, p. 16. While citing the general rule requiring remand of erroneous remittiturs, *Matherne v. Wilson*, 851 F.2d 752 (5th Cir. 1988), nevertheless denied plaintiff's request for a remand to choose having a new trial to redetermine his entitlement to "nominal" damages where plaintiff had received actual damages and the trial court should have set aside the entire award of nominal damages rather than merely reducing it. *May v. Ellis Trucking Co., Inc.*, 243 F.2d 526 (6th Cir. 1957), involved a three paragraph *per curiam* decision remanding for reconsideration defendant's motion for new trial which resulted in the trial judge entering a judgment for the plaintiff for $25,000 rather than the $42,000 awarded by the jury, where the verdict "shocked the conscience of the Court." The court of appeals merely noted the trial court's error in ordering a forced remittitur without the option of a new trial and upon remand directed the trial court to grant or deny the motion for a new trial generally or to deny a new trial upon the condition of plaintiff's acceptance of a remitted verdict. There was no discussion of the nature and extent of plaintiff's actual damages or whether, as in the present case, the evidence showed the amount of the verdict to be within the range of proofs received in evidence. *May*, therefore, is hardly authority for the proposition that remands for erroneous remittiturs must be ordered in every case. *Staplin v. Maritime Overseas Corp.*, 519 F.2d 969 (2nd Cir. 1975), also recognized that remand of erroneous remittiturs is generally required, but reversed and entered a final judgment for the plaintiff because, as here, *the evidence showed the verdict to in fact have been within the range of plaintiff's proofs.* It was this fact, in addition to the small amounts

involved ($3500 versus $2335) and the need to terminate the litigation, that convinced the court not to remand to allow a choice for a new trial. *Staplin* did not adopt a new and different procedural rule for the Second Circuit in remittitur cases. Rather it represents the exercise of appellate discretion to correct error in a fair and efficient manner in order to terminate excessive litigation between the parties.

Brewer v. Uniroyal, Inc., 498 F.2d 973 (6th Cir. 1974), likewise was a case in which the court declined to remand a forced remittitur rather than reinstating the verdict where the evidence showed the jury's award to be "*clearly* within the 'maximum limit of a reasonable range,' " *Brewer*, at 977-978, citing *Manning v. Altec, Inc.*, 488 F.2d 127, at 133 (6th Cir. 1973) (emphasis in original). In such cases, where there is clear evidence to support the jury's award, remand would be superfluous. *Brewer* was not really a departure from existing authority which requires remands in most but not all cases of erroneous remittiturs. Defendant has not shown any significant dichotomy between the Sixth and other circuits or within the Sixth Circuit requiring intervention by this Court.

III. Appellate Courts May Grant Final Relief, Including Appropriate Equitable Remedies Such As Prejudgment Interest And Front Pay, Where The Record Shows Plaintiff Is Clearly Entitled To Such Relief.

Defendant also claims that the Court of Appeals' decision below changed the nature of equitable remedies under the Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.*, from being discretionary to mandatory. Petition, p. 18. Defendant mischaracterizes the decision below.

A. Prejudgment interest

Defendant argues that the Court of Appeals, upon determining that the trial court erroneously denied plaintiff's request for prejudgment interest for the sole reason of having been untimely filed, should have remanded the matter to the district court to redetermine if there are *other* reasons to deny it. *Ibid.*, at 18-19. Defendant wants a second bite at the apple and complains that the appellate court usurped the trial court's rightful discretion. Had there been additional reasons showing plaintiff's lack of entitlement to prejudgment interest, the trial court could and should have stated them. It did not. The adage that to express one thing is to exclude all others, while primarily applied to statutory interpretation, has relevance here. Litigation would never end if what the defendant seeks were granted in all cases. Allowing the trial judge to consider anew and to reject plaintiff's entitlement to prejudment interest for any of the additional reasons originally proffered by the defendant and, presumably rejected by the trial judge, would set in motion a never-ending chain of hearings and appeals. Once the trial court was shown to have declined to exercise its discretion in granting prejudgment interest for alleged untimeliness and for no other reason, it did not constitute an unlawful usurpation of the trial judge's discretion for the Court of Appeals to order the trial court to order the defendant to pay the interest to which plaintiff was entitled, using its discretion in calculating the amount.

B. Front pay

Defendant claims, finally, that when the Court of Appeals stated that "front pay is a remedy presumed appropriate" for the plaintiff, it meant that such relief

was mandatory. Petition, p. 20. Defendant faults the court for citing *Davis v. Combustion Engineering*, 742 F.2d 916, 922-23 (6th Cir. 1984), which declared that "[f]ront pay does not appear to lend itself to a per se rule" and "is neither mandatory nor prohibitied by the Act." While not exactly in point for the proposition stated, *Davis* and other cases do show that front pay is indeed presumed appropriate in most, although not all, cases where the plaintiff has been unlawfully denied appointment to the position in question. Although reinstatement is the preferred remedy for successful plaintiffs in ADEA cases (*Blim v. Western Electric Co.*, 731 F.2d 1473, 1479 (10th Cir.), *cert. denied, sub. nom AT&T Technologies, Inc. v. Blim*, 469 U.S. 87 (1984); *Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435, 1448 (11th Cir.) *cert. denied*, 474 U.S. 1005 (1985)), front pay is generally deemed necessary to adequately compensate the plaintiff for the denied position, except where the employer can prove it would be inappropriate. Such circumstances are few and must be clearly disqualifying. *See, for example: Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 616 (1st Cir. 1985) (front pay may be denied where too speculative to compute or fact that liquidated damages were awarded); *Dillon v. Coles*, 746 F.2d 998, 1006 (3rd Cir. 1984) (front pay denied where evidence shows position no longer in existence—here due to closing of business soon after backpay order); *O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543, 1551 (11th Cir. 1984) (where plaintiff is shown to have refused reasonable offer of reinstatement); *Bartek v. Redevelopment Authority of Pittsburgh*, 882 F.2d 739, 747 (3rd Cir. 1989) (denied position abolished before trial and no comparable position shown to exist); *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1209 (7th Cir. 1989) (employer can

show plaintiff would have been separated in a post-trial reduction-in-force); and *Floca v. Homcare Healthcare Services, Inc.*, 845 F.2d 108, 112 (5th Cir. 1988) (plaintiff voluntarily removed self from job market by entering graduate school).

Plaintiff submits that the court below committed no error necessitating review in describing front pay as a remedy "presumed appropriate" for the plaintiff in this case if, after a proper evidentiary hearing, the trial court finds substantial reasons to deny appointment of the plaintiff to a Central Office administrative position.

CONCLUSION

Certiorari should not be granted in this case. The Court of Appeals properly granted final judgment on both of plaintiff's Title VII claims, as well as finding plaintiff entitled to an order of prejudgment interest, while remanding on the issue of front pay. The court below neither departed from accepted procedure, nor created any split by ignoring circuit precedent. Defendant, moreover, has shown no reason why it should not be collaterally estopped from asserting in the §1983 remand trial a legally insufficient non-discriminatory reason for having chosen a male over the plaintiff in 1980 for the position of Director of Instruction, when that issue has been already decided adverse to the defendant and *no other evidence could be offered to change the successful appointee's lack of minimum qualifications.* Jury trials are not required where undisputed evidence shows that under no set of circumstances could the party seeking a trial succeed if he had a trial. The Seventh Amendment doesn't guarantee "show" trials.

Respectfully submitted,

LEONARD F. LYBARGER
Counsel of Record
2000 Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 771-4600

Attorney for Respondent
Therese A. Farber